

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL LARUE BROWN,
Plaintiff,
v.
LIEUTENANT BASS, et al.,
Defendants.

Case No. [23-cv-04392-TLT](#)

**ORDER VACATING JUDGMENT AND
REOPENING CASE,
OF SERVICE**

Plaintiff, a state prisoner incarcerated at San Quentin State Prison (SQSP), has filed a pro se civil rights action in which he alleges violations of his constitutional rights by SQSP prison officials. The Court previously dismissed plaintiff's action for failing to file his complaint through the email procedures required by General Order No. 76. ECF 8. Plaintiff subsequently filed his complaint by email in compliance with General Order No. 76. ECF 10. The Court will vacate the prior judgment (ECF 9), reopen the case, and order service of the complaint and attachment on defendants. Plaintiff's motion for leave to proceed *in forma pauperis* will be granted by separate order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See United States v. Qazi*, 975 F.3d

1 989, 993 (9th Cir. 2020).

2 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
3 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Specific facts are not
4 necessary; the statement need only ““give the defendant fair notice of what the . . . claim is and the
5 grounds upon which it rests.”” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted).
6 While Rule 8 does not require detailed factual allegations, it demands more than an unadorned,
7 the-defendant-unlawfully-harmed-me accusation. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009).
8 A pleading that offers only labels and conclusions, or a formulaic recitation of the elements of a
9 cause of action, or naked assertions devoid of further factual enhancement does not suffice. *Id.*

10 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1)
11 that a right secured by the Constitution or laws of the United States was violated, and (2) that the
12 alleged violation was committed by a person acting under the color of state law. *See West v.*
13 *Atkins*, 487 U.S. 42, 48 (1988).

14 **B. Legal Claims**

15 Plaintiff alleges that he was subjected to an unclothed body search on October 8, 2022
16 orchestrated by defendants Lieutenant Bass, Sergeant Taylor, and Sergeant Simpson. Defendant
17 Taylor instructed plaintiff and a number of other prisoners to “full[y] disrobe and hand your
18 clothes to the searching officers,” to face the searching officers and follow their commands “to lift
19 your sack (genitalia), open your mouth, move your tongue, turn around peel open your anus, bend
20 over and squat and cough, lift your feet and show the bottoms” and then get redressed. ECF 10 at
21 3. Plaintiff requested modesty accommodations of performing the search indoors instead of in
22 public. Defendants Bass and Taylor both refused his request. *Id.*

23 As plaintiff was disrobing, he was in the direct line of sight of a staff entry gate where
24 doctors, nurses, mental health staff, auxiliary support staff, plumbers, electricians, painters, IT
25 staff, vocational trade teachers, canteen workers and correctional guards, sergeants, lieutenants,
26 and captains of both genders enter the area. Three nurses stopped and faced plaintiff and observed
27 the search while having a conversation. *Id.* at 4. The search was conducted in the view of “fifteen
28 other prisoners of various identity pronouns affiliations” as well as the three defendants and over

1 15 other correctional officers.

2 Plaintiff also alleges that SQSP staff have been retaliating against him for filing this
3 lawsuit, preventing him from submitting a full copy of the complaint to the Court. ECF 10-1 at 1-
4 2. He alleges that various guards under the direction of defendant Bass have been harassing and
5 intimidating him and issuing false Rules Violation Reports. *Id.*

6 Plaintiff seeks compensatory and punitive damages.

7 Liberally construed, plaintiff states a claim against all defendants for violating his Fourth
8 Amendment rights. The Ninth Circuit has held that some cross-gender strip searches are
9 unconstitutional. *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1142 (9th Cir. 2011) (en
10 banc) ("*Byrd I*"). The regularity or frequency of the cross-gender searches or viewing of
11 unclothed prisoners, as well as the "scope and manner of the intrusions," and the existence of a
12 legitimate reason for them, are relevant to determining whether there is a violation. *Byrd v.*
13 *Maricopa Cty. Bd. of Supervisors*, 845 F.3d 919, 922 (9th Cir. 2017) ("*Byrd II*"). While plaintiff
14 alleges a one-time public search, the scope and manner are enough to state a plausible claim. He
15 alleges that female prison staff viewed him fully unclothed, with no obstruction, from very near,
16 and without a legitimate reason.

17 Liberally construed, plaintiff has stated a First Amendment claim for retaliation against
18 defendant Bass. A viable claim of First Amendment retaliation entails five basic elements: (1) An
19 assertion that a state actor took some adverse action against an inmate (2) because of (3) that
20 prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First
21 Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal."
22 *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted).

23 CONCLUSION

24 For the foregoing reasons, the Court orders as follows:

- 25 1. The Clerk shall vacate the prior judgment and reopen the case.
- 26 2. Plaintiff has stated a cognizable section 1983 Fourth Amendment claim against
27 defendants Bass, Simpson, and Taylor.
- 28 3. Plaintiff has stated a cognizable section 1983 First Amendment retaliation claim

1 against defendant Bass.

2 4. The Court ORDERS that service on the following defendants shall proceed under
3 the California Department of Corrections and Rehabilitation's ("CDCR") e-service program for
4 civil rights cases from prisoners in the CDCR's custody:

- 5 a. Lieutenant Bass
- 6 b. Sergeant Taylor
- 7 c. Sergeant Simpson

8 In accordance with the program, the Clerk is directed to serve on the CDCR via email the
9 following documents: the operative complaint and attachment (ECF 10 and 10-1), this Order of
10 Service, a CDCR Report of E-Service Waiver form, and a summons. The Clerk also shall serve a
11 copy of this order on the plaintiff.

12 No later than 40 days after service of this order via email on the CDCR, the CDCR shall
13 provide the court a completed CDCR Report of E-Service Waiver advising the court which
14 defendant(s) listed in this order will be waiving service of process without the need for service by
15 the United States Marshal Service ("USMS") and which defendant(s) decline to waive service or
16 could not be reached. The CDCR also shall provide a copy of the CDCR Report of E-Service
17 Waiver to the California Attorney General's Office which, within 21 days, shall file with the Court
18 a waiver of service of process for the defendant(s) who are waiving service.

19 Upon receipt of the CDCR Report of E-Service Waiver, the Clerk shall prepare for each
20 defendant who has not waived service according to the CDCR Report of E-Service Waiver a
21 USM-205 Form. The Clerk shall provide to the USMS the completed USM-205 forms and copies
22 of this order, the summons and the operative complaint for service upon each defendant who has
23 not waived service. The Clerk also shall provide to the USMS a copy of the CDCR Report of E-
24 Service Waiver.

25 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure
26 requires defendants to cooperate in saving unnecessary costs of service of the summons and
27 complaint. If service is waived, this action will proceed as if defendants had been served on the
28 date that the waiver is filed, except that pursuant to Rule 12(a)(1)(A)(ii), defendants will not be

required to serve and file an answer before **sixty (60) days** from the date on which the CDCR provides a copy of the CDCR Report of E-Service Waiver to the California Attorney General's Office. (This allows a longer time to respond than would be required if formal service of summons is necessary.) If defendants have not waived service and have instead been served by the USMS, then defendants shall serve and file an answer within **twenty-one (21) days** after being served with the summons and complaint.

6. Defendants shall answer the complaint in accordance with the Federal Rules of Civil Procedure. The following briefing schedule shall govern dispositive motions in this action:

a. No later than **sixty (60) days** from the date their answer is due, defendants shall file a motion for summary judgment or other dispositive motion. The motion must be supported by adequate factual documentation, must conform in all respects to Federal Rule of Civil Procedure 56, and must include as exhibits all records and incident reports stemming from the events at issue. A motion for summary judgment also must be accompanied by a *Rand*¹ notice so that plaintiff will have fair, timely, and adequate notice of what is required of him in order to oppose the motion. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out in *Rand* must be served concurrently with motion for summary judgment). A motion to dismiss for failure to exhaust available administrative remedies must be accompanied by a similar notice. However, the Court notes that under the law of the circuit, in the rare event that a failure to exhaust is clear on the face of the complaint, defendants may move for dismissal under Rule 12(b)(6), as opposed to the previous practice of moving under an unenumerated Rule 12(b) motion. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc) (overruling *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), which held that failure to exhaust available administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) ("PLRA"), should be raised by a defendant as an unenumerated Rule 12(b) motion). Otherwise, if a failure to exhaust is not clear on the face of the complaint, defendants must produce evidence proving failure to exhaust in a motion for summary judgment under Rule 56. *Id.* If undisputed evidence

¹ *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998).

viewed in the light most favorable to plaintiff shows a failure to exhaust, defendants are entitled to summary judgment under Rule 56. *Id.* But if material facts are disputed, summary judgment should be denied and the district judge, rather than a jury, should determine the facts in a preliminary proceeding. *Id.* at 1168.

If defendants are of the opinion that this case cannot be resolved by summary judgment, they shall so inform the Court prior to the date the summary judgment motion is due. All papers filed with the Court shall be promptly served on plaintiff.

b. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on defendants no later than **twenty-eight (28) days** after the date on which defendants' motion is filed.

c. Plaintiff is advised that a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact—that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is supported properly by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial. *Rand*, 154 F.3d at 962-63.

Plaintiff also is advised that—in the rare event that defendants argue that the failure to exhaust is clear on the face of the complaint—a motion to dismiss for failure to exhaust available administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit without prejudice. To avoid dismissal, you have the right to present any evidence to show that you did

1 exhaust your available administrative remedies before coming to federal court. Such evidence
 2 may include: (1) declarations, which are statements signed under penalty of perjury by you or
 3 others who have personal knowledge of relevant matters; (2) authenticated documents—
 4 documents accompanied by a declaration showing where they came from and why they are
 5 authentic, or other sworn papers such as answers to interrogatories or depositions; (3) statements
 6 in your complaint insofar as they were made under penalty of perjury and they show that you have
 7 personal knowledge of the matters state therein. As mentioned above, in considering a motion to
 8 dismiss for failure to exhaust under Rule 12(b)(6) or failure to exhaust in a summary judgment
 9 motion under Rule 56, the district judge may hold a preliminary proceeding and decide disputed
 10 issues of fact with regard to this portion of the case. *Albino*, 747 F.3d at 1168.

11 (The notices above do not excuse defendants' obligation to serve similar notices again
 12 concurrently with motions to dismiss for failure to exhaust available administrative remedies and
 13 motions for summary judgment. *Woods*, 684 F.3d at 935.)

14 d. Defendants shall file a reply brief no later than **fourteen (14) days** after the
 15 date plaintiff's opposition is filed.

16 e. The motion shall be deemed submitted as of the date the reply brief is due.
 17 No hearing will be held on the motion unless the Court so orders at a later date.

18 7. Discovery may be taken in this action in accordance with the Federal Rules of Civil
 19 Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to defendants to depose
 20 plaintiff and any other necessary witnesses confined in prison.

21 8. All communications by plaintiff with the Court must be served on defendants or
 22 their counsel, once counsel has been designated, by mailing a true copy of the document to them.


23 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
 24 informed of any change of address and must comply with the Court's orders in a timely fashion.
 25 Pursuant to Northern District Local Rule 3-11, a party proceeding *pro se* whose address changes
 26 while an action is pending must promptly file a notice of change of address specifying the new
 27 address. *See* L.R. 3-11(a). The Court may dismiss without prejudice a complaint when: (1) mail
 28 directed to the *pro se* party by the Court has been returned to the Court as not deliverable, and (2)

1 the Court fails to receive within sixty days of this return a written communication from the *pro se*
2 party indicating a current address. *See* L.R. 3-11(b).

3 10. Upon a showing of good cause, requests for a reasonable extension of time will be
4 granted provided they are filed on or before the deadline they seek to extend.

5 **IT IS SO ORDERED.**

6 Dated: January 12, 2024

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9 TRINA L. THOMPSON
10 United States District Judge
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